

***National Labor Relations Board***  
**OFFICE OF THE GENERAL COUNSEL**  
**Advice Memorandum**

**DATE:** August 17, 1998

**TO:** Victoria E. Aguayo, Regional Director, Region 21

**FROM:** Barry J. Kearney, Associate General Counsel, Division of Advice

**SUBJECT:** Anderson Seafoods, Inc., Case 21-CA-32671

512-8030-7000, 512-8030-8000

This case was submitted for advice regarding whether the Employer violated Section 8(a)(1) by seeking discovery of Union organizing activities and pending Board charges in its defense of an employee wage and hour lawsuit.

**FACTS**

In late 1996, the United Food and Commercial Worker's Union Local 324 ("Union") began to organize the employees of Anderson Seafoods, Inc. ("Employer"), a packer and distributor of fresh and frozen seafoods located in Anaheim, California. Salts, paid Union organizers who obtained jobs with the Employer, informed the Union that the Employer had not paid them and other employees for overtime work. As part of its organizing strategy, the Union obtained the employees' authorization to represent them in wage and hour lawsuits for their overtime claims. The Union filed two wage and hour lawsuits against the Employer, listing the employees as plaintiffs: a federal court lawsuit was filed on January 29, 1997 pursuant to the Fair Labor Standards Act; and a state court lawsuit in the California Superior Court was filed on February 18, 1997 pursuant to the state's wage and hour laws ("State Lawsuit"). In February 1998, the wage and hour lawsuits were amended to include allegations of retaliatory discharge for having filed wage and hour claims. The State Lawsuit is scheduled to be tried on September 21, 1998.

On March 13, 1998 <sup>(1)</sup> the Employer propounded discovery requests on the Union and the Union's Organizing Director, Rick Eiden ("Eiden") in the State Lawsuit. <sup>(2)</sup>

The Employer requested deposition testimony from the Union relating to:

1. All activities of United Food and Commercial Workers Union, Local 324, including without limitation its agents and employees ("YOUR"), relating to any litigation between Anderson Seafoods, Inc. ("ANDERSON") and the following individuals: Thonathiu Sotelo, Miguel Dugue-Bello, Rene Garrido, Armando Gonzalez, Jose S. Molina, Victor Pineda, Victor Rebollar, Gabriel Reyes-Garcia, Jose Luis Rivera, David Rosas, Francisco Torres, Manuel Vargas, John Getz or Gabriel Torres-Lopez (collectively "PLAINTIFFS").
2. Communications between YOU and any PLAINTIFF.
3. Communications between YOU and any individual or entity regarding any PLAINTIFF.
4. Communications between YOU and any individual or entity relating to any litigation between PLAINTIFFS and ANDERSON.
5. Payments made by YOU to or on behalf of any PLAINTIFF.
6. YOUR employment of any PLAINTIFF.
7. Payments made by YOU to any temporary employment agency relating to any work done or services performed by any

PLAINTIFF.

8.Any information YOU possess regarding the claims made by PLAINTIFFS in their lawsuits against ANDERSON.

9.Any information YOU possess regarding any and all of ANDERSON's affirmative defenses in the pending lawsuits between PLAINTIFFS and ANDERSON.

10.YOUR efforts to organize ANDERSON's employees to the extent those efforts relate in any way to this litigation or the claims made in this litigation.

The Employer requested the following documents from the Union:

1.ALL DOCUMENTS that refer or relate to Anderson Seafoods, Inc. ("ANDERSON").

2.ALL DOCUMENTS that refer or relate to any of the following individuals: Thonathiu Sotelo, Miguel Dugue-Bello, Rene Garrido, Armando Gonzalez, Jose S. Molina, Victor Pineda, Victor Rebollar, Gabriel Reyes-Garcia, Jose Luis Rivera, David Rosas, Francisco Torres, Manuel Vargas, John Getz or Gabriel Torres-Lopez (collectively "PLAINTIFFS") to the extent such DOCUMENTS relate in any way to this lawsuit or the claims in this lawsuit.

3.ALL DOCUMENTS that refer or relate to the employment of any PLAINTIFF by ANDERSON.

4.ALL DOCUMENTS that identify, refer or relate to any lawsuit between any PLAINTIFF and ANDERSON.

5.ALL DOCUMENTS that identify, refer or relate to any proceeding before the National Labor Relations Board relating to ANDERSON's employment of any PLAINTIFF, to the extent those DOCUMENTS refer or relate in any way to this litigation or the claims made in this litigation.

6.ALL DOCUMENTS that identify, constitute, refer or relate to any communication between you or the United Food and Commercial Workers Union, Local No. 324, including without limitation its representatives, agents and employees ("UFCW"), and any PLAINTIFF regarding ANDERSON to the extent those DOCUMENTS refer or relate in any way to this litigation or the claims made in this litigation.

7.ALL DOCUMENTS that identify, constitute, refer or relate to any communication between you or the UFCW and the National Labor Relations Board that refers or relates to the employment of any PLAINTIFF at ANDERSON, to the extent those DOCUMENTS refer or relate in any way to this litigation or the claims made in this litigation.

8.ALL DOCUMENTS that identify, constitute, refer or relate to any communication between any PLAINTIFF and Gilbert & Sackman, to the extent that either (1) such communication was provided to you or any other individual or entity that is not a party to the litigation between PLAINTIFFS and ANDERSON, (2) such communication was made in the presence of you or any other individual or entity that is not a party to the litigation between PLAINTIFFS and ANDERSON, or (3) the contents of such communication were otherwise disclosed to you or any other individual or entity that is not a party to, or counsel for a party to, the litigation between PLAINTIFFS and ANDERSON.

9.ALL DOCUMENTS that identify, constitute, refer or relate to the UFCW's sponsorship of any litigation between any PLAINTIFF and ANDERSON.

10.ALL DOCUMENTS that constitute, identify, refer or relate to any employment of any PLAINTIFF after that PLAINTIFF employment at ANDERSON.

11.ALL DOCUMENTS that constitute, identify, refer or relate to any payments by you or any other individual or entity to PLAINTIFF, including without limitation canceled checks, payroll records, receipts, or other DOCUMENTS.

12.ALL DOCUMENTS that constitute, identify, refer or relate to any payments by you or any other individual or entity to any

temporary employment agency relating to any PLAINTIFF, including without limitation, canceled checks, payroll records, receipts, or other DOCUMENTS.

Finally, the Employer requested the following documents from Eiden:

- 1.ALL DOCUMENTS that refer to Anderson Seafoods, Inc. "ANDERSON").
- 2.ALL DOCUMENTS that refer or relate to any of the following individuals: Thonathiu Sotelo, Miguel Duque-Bello, Rene Garrido, Armando Gonzalez, Jose S. Molina, Victor Pineda, Victor Rebollar, Gabriel Reyes-Garcia, Jose Luis Rivera, David Rosas, Francisco Torres, Manuel Vargas, John Getz or Gabriel Torres-Lopez (collective "PLAINTIFFS"), to the extent such DOCUMENTS relate in any way to this litigation or the claims at issue in this litigation.
- 3.ALL DOCUMENTS that refer or relate to the employment of any PLAINTIFF by ANDERSON.
- 4.ALL DOCUMENTS that identify, refer or relate to any lawsuit between any PLAINTIFF and ANDERSON.
- 5.ALL DOCUMENTS that identify, refer or relate to any proceeding before the National Labor Relations Board relating to ANDERSON's employment of any PLAINTIFF, to the extent those documents refer or relate in any way to this litigation or the claims made in this litigation.
- 6.ALL DOCUMENTS that identify, constitute, refer or relate to any communication between the United Food and Commercial Workers Union, Local No. 324, including without limitation its representatives, agents and employees ("UFCW"), and any PLAINTIFF regarding ANDERSON, to the extent those documents refer or relate in any way to this litigation, including without limitation any communication relating to any lawsuit between any PLAINTIFF and ANDERSON or any proceeding before the National Labor Relations Board regarding ANDERSON.
- 7.ALL DOCUMENTS that identify, constitute, refer or relate to any communication between you or the UFCW and the National Labor Relations Board that refers or relates to the employment of any PLAINTIFF at ANDERSON to the extent those documents refer or relate in any way to this litigation.
- 8.ALL DOCUMENTS that identify, constitute, refer or relate to any communication between any PLAINTIFF and Gilbert & Sackman, to the extent that either (1) such communication was provided to you or any other individual or entity that is not a party to the litigation between PLAINTIFFS and ANDERSON, (2) such communication was made in the presence of you or any other individual or entity that is not a party to the litigation between PLAINTIFFS and ANDERSON, or (3) the contents of such communication were otherwise disclosed to you or any other individual or entity that is not a party to, or counsel for a party to, the litigation between PLAINTIFFS and ANDERSON.
- 9.ALL DOCUMENTS that identify, constitute, refer or relate to the UFCW's sponsorship of any litigation between any PLAINTIFF and ANDERSON.
- 10.ALL DOCUMENTS that constitute, identify, refer or relate to any employment of any PLAINTIFF after that PLAINTIFF employment at ANDERSON.
- 11.ALL DOCUMENTS that constitute, identify, refer to relate to any payments by the UFCW, you, or any other individual or entity to any PLAINTIFF, including without limitation canceled checks, payroll records, receipts, or other documents.
- 12.ALL DOCUMENTS that constitute, identify, refer or relate to any payments by you or any other individual or entity to any temporary employment agency relating to any PLAINTIFF, including without limitation canceled checks, payroll records, receipts, or other DOCUMENTS.

On June 10th, the Union moved for a protective order and subpoena modification to limit the Employer's discovery requests in the State Lawsuit. The Union argued that discovery of Union organizing and pending NLRB proceedings violates the Act, impinges on the Union's right of association, and involves material protected by the attorney-client and work product

privileges. This motion is scheduled to be heard on August 21, 1998. <sup>(3)</sup>

The Union also filed the instant charge alleging that the Employer's discovery requests violate Section 8(a)(1) of the Act because they seek disclosure of Union organizing activities and information provided in pending Board proceedings.

Currently pending before the Board are two additional Union charges: (1) Case 21-CA-32671, filed September 1997, which alleges that two employer lawsuits claiming that the Union misappropriated and unlawfully distributed confidential company seafood inspection data and customer lists violate Section 8(a)(1) because they are baseless and retaliatory; and (2) Case 21-CA-32154, complaint issued February 1998, which alleges that the Employer solicited employees to sign releases for all overtime claims in exchange for \$500 in violation of Section 8(a)(1). <sup>(4)</sup>

### ACTION

We conclude that, absent withdrawal, the Region should dismiss the charge that the Employer's discovery requests violate Section 8(a)(1) of the Act.

In *Maritz Communications Co.*, <sup>(5)</sup> the Board held that an employer did not violate Section 8(a)(1) by deposing the plaintiff in a civil lawsuit regarding (1) his relationship with the union and (2) the unlawful discharge charge he had filed with the Board because the deposition questions were "within the scope of arguably relevant questioning permitted by the Federal Rules of Civil Procedure." <sup>(6)</sup> The Board noted that because the plaintiff's age discrimination claim and unfair labor practice charge arose out of the "same or similar operative facts," the employer's questions regarding the plaintiff's work history and employment termination were "likely to touch on a number of areas also related to the unfair labor practice proceeding." <sup>(7)</sup> The Board also noted that the employer's questions regarding the plaintiff's union activity was relevant to the employer's defense that the plaintiff was not terminated due to his age, particularly where the plaintiff's Board charge alleged discharge for engaging in union activities. <sup>(8)</sup> Finally, the Board rejected the argument that the employer's discovery violated Section 8(a)(1) because it failed to conduct its questioning in compliance with *Johnnie's Poultry*, <sup>(9)</sup> holding that the plaintiff "must or should have been aware that the [employer] could examine him concerning any matter relevant to the preparation of a defense to the civil suit." <sup>(10)</sup>

Applying *Maritz Communications*, the Employer's discovery requests in the instant matter do not violate Section 8(a)(1) of the Act.

Like the federal civil procedure rules at issue in *Maritz Communications*, the California discovery rules apply an "arguably relevant" standard to discovery requests. Specifically, the California rules allow parties to inquire into any matter that is "relevant to the subject matter involved in the pending action," <sup>(11)</sup> or might reasonably lead to the discovery of relevant evidence. <sup>(12)</sup> The Employer's discovery requests satisfy this standard. Through its organizing campaign the Union learned of the Employer's wage and hour violations, and the Union admits it sponsored the wage and hour lawsuits as part of its organizing campaign. Moreover, several of the salts (who were dually employed by the Union and Employer) are claimants in those wage and hour lawsuits, and contend they were discharged by the Employer in retaliation for participating in those lawsuits. Thus, the Employer's deposition questions and document requests relating to the Union's organizing activities, its communications with its salts, and its sponsorship of the wage and hour lawsuits are arguably relevant to the wage and hour lawsuits.

The Employer's discovery requests are not unlawful per se under the Act simply because they seek information pertaining to pending Board proceedings. As in *Maritz Communications*, here the Employer's relevant discovery in the civil litigation is likely "to touch on" areas related to charges pending before the Board because the lawsuit and Board charges arise out of the same operative facts. The Employer's defenses to the wage and hour lawsuit are, inter alia, that the plaintiffs waived their right to overtime claims by their negligent, disobedient, or unlawful conduct. This conduct is at issue in the breach of confidential information lawsuits brought by the Employer, which lawsuits the Union charges violate Section 8(a)(1) because they are baseless and retaliatory. <sup>(13)</sup> Likewise, the Employer may defend the wage and hour claims by arguing that employees released their claims, even as the Board is litigating whether the Employer attempted to purchase releases of the wage and hour claims

in violation of the Act.

Further, we conclude that Maritz Communications controls this matter because the Employer's discovery requests here do not create an undue risk of interference with Board processes. There are no allegations of mass retaliatory discharges [or even any Section 8(a)(3) charges] pending before the Board,<sup>(14)</sup> nor are there other allegations of Employer conduct that is inherently destructive of employees' Section 7 rights.<sup>(15)</sup> Consequently, on the evidence presented there is no reason for the Board to seek to enjoin the discovery, particularly where the Union has already sought a protective order under ordinary court procedures in order to limit the scope of the Employer's discovery.

### CONCLUSION

For these reasons, we conclude that, absent withdrawal, the Region should dismiss the charge that the Employer's discovery requests violate Section 8(a)(1) of the Act.

B.J.K.

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<sup>1</sup> Hereinafter, all dates refer to 1998 unless otherwise noted.

<sup>2</sup> The Union and Employer stipulated that all discovery would be effective for both the federal and state court wage and hour lawsuits.

<sup>3</sup> During Eiden's deposition on June 10th, the Union's attorney objected to Employer questions on the same grounds stated in the Union's motion for protective order, and Eiden was instructed not to answer those questions.

<sup>4</sup> It is scheduled for hearing November 2, 1998. A third Union charge of retaliatory discharge was dismissed by the Region.

<sup>5</sup> 274 NLRB 200, 201 (1985).

<sup>6</sup> Id. The Board wrote that Fed. R. Civ. P. 26(b) provides that parties may inquire into matters relevant to the subject matter of the pending action, and relevancy encompasses "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. . . ." Id. (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1977)).

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> 146 NLRB 770, 775 (1964) (holding that an employer preparing its defense of a court case may interrogate employees if it communicates the purpose of the questioning, gives assurances that no reprisals will take place, and the questioning is voluntary, in a context free of employer hostility, and does not pry into union matters or otherwise interfere with Section 7 rights), enf. denied on other grounds, 344 F.2d 617 (8th Cir. 1965).

<sup>10</sup> 274 NLRB at 201-02. The Board's Maritz Communications decision is consistent with the decisions of numerous federal courts that parties to a civil lawsuit are entitled to discover relevant information, even if it relates to a pending Board proceeding. See, e.g., *Halloran v. Fisher Foods, Inc.*, 96 LRRM 3093, 3094 (N.D. Ohio 1977) (employer defending a Section 301 lawsuit was entitled to discover all relevant information, although the court noted that the employer's attempt to obtain Board affidavits might constitute an unfair labor practice); *NLRB v. Katz Drug Co.*, 207 F.2d 168, 171-72 (8th Cir. 1953) (court rejected contention that all inquiry into union membership is "unlawful per se," as the Board is not entitled to prescribe

"what evidence the courts are entitled to receive or the parties are entitled to present, just because the suit is one between an employer and an employee or an employer and a labor union. . . .").

<sup>11</sup> Cal. Civ. Proc. Code Section 2017(a).

<sup>12</sup> See, e.g., 2 Witkin California Evidence Section 1462 (3d ed.); Lipton v. Superior Court, 48 Cal. App. 4th 1599, 1612, 56 Cal. Rptr. 2d 341, 347 (1996) ("the scope of discovery extends to *any information* that reasonably might lead to other evidence that would be admissible at trial:).

<sup>13</sup> The Employer contends that the Union salts misappropriated seafood sanitation surveys and customers lists, and then distributed that information to third parties in violation of California law.

<sup>14</sup> To the contrary, the plaintiffs allege that they were discharged in retaliation for filing their wage and hour lawsuits.

<sup>15</sup> Cf. Wright Electric, Inc., Case 18-CA-12820, Advice Mem. dated April 4, 1994 , as modified July 26, 1994 (concluding that the employer violated Section 8(a)(1) by seeking to discover irrelevant and protected information relating to union salts and any union intention to put the employer out of business in context of employer lawsuit over salt's alleged false misrepresentation in employment application). In a November 26, 1996 decision, the ALJ in Wright Electric declined to find a violation of the Act based on the employer's discovery requests. The issue is on exceptions before the Board.